

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

SEP 11 2013


CLERK

DARYL T. SCHEETZ,

Petitioner,

vs.

DARIN YOUNG, Warden¹; and
MARTY JACKLEY, Attorney General,
State of South Dakota,

Respondents.

CIV 13-4011

MEMORANDUM OPINION
AND ORDER

Respondents have made the filing (Doc. 23) on September 4, 2013, as directed by this Court's previous Memorandum Opinion and Order of August 19, 2013. (Doc. 27). Petitioner also responded by his letter of September 9, 2013, filed September 11, 2013.

After reviewing those documents, including the separate plea taking, July 3, 2007, and sentencing hearings, July 31, 2007, before the state court trial judge, Judge Glen Eng, it is clear that there was no inadequate representation of Petitioner Scheetz by his lawyer. The plea agreement was memorialized by a letter of July 2, 2007, from defense counsel to the prosecutor.

Judge Eng made it clear at the plea taking that he was not bound by the plea agreement. The plea agreement did provide for concurrent sentences. Judge Eng sentenced Petitioner to consecutive sentences but the judge was not obligated by the plea agreement between the lawyers for their respective parties.

Further, this Court adopts and incorporates the Findings of Fact and Conclusions of Law dated May 29, 2012, entered by Judge Gering in the state habeas proceedings, those Findings and Conclusions being a part of Document 23.

Finally, in view of the above, this Court finds that Petitioner has failed to make a "substantial

¹Darin Young became the Warden of the South Dakota State Penitentiary on May 24, 2013. He has been substituted as the named Defendant in this action pursuant to Fed. R. Civ. P. 24(d).

showing of a denial of a constitutional right” and as a result no certificate of appealability will be issued in this case.

Respondents filed a Motion for Summary Judgment yesterday, September 10, 2013, with an Affidavit that when Petitioner was transferred to the State Prison in Sioux Falls, the property transfer of January 29, 2009, showed "Legal or other paperwork." Petitioner claims that his legal papers were not included. In order to resolve this late filed Summary Judgment Motion the Court would have to have an evidentiary hearing to resolve in fact what papers were transferred. The Affidavit submitted in support of the Motion for Summary Judgment does not establish that the legal papers were delivered to Petitioner at the time of his transfer. It would be helpful if the DSP-9 form had a separate box to indicate "Legal papers" as the current box is ambiguous and does not clearly establish that Petitioner received his legal papers as opposed to whatever other papers he may have had.

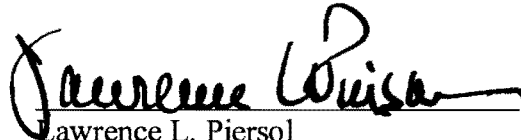
The Court had prepared its opinion on the basis of ruling on the still outstanding portion of the Report and Recommendation, that being the question of whether or not Petitioner had made a substantial showing of a denial of a constitutional right. The Court ruling that there has been no such showing makes the new Motion for Summary Judgment regarding tolling moot. Accordingly,

IT IS ORDERED:


1. That Respondents' Motion for Summary Judgment is denied as untimely, as moot, and as inadequate to establish delivery of legal papers.
2. That Petitioner's Objection to that portion of the Report and Recommendation which found no showing of a denial of a constitutional right is denied, and the Report and Recommendation of Magistrate Judge John E. Simko is adopted on that issue.
3. That Respondents' Motion to Dismiss, Doc. 5, is granted on the basis that Petitioner made no substantial showing of a denial of a constitutional right.
4. That Petitioner's Application for Writ of Habeas Corpus, Doc. 1, is denied with prejudice.
5. That no certificate of appealability will be issued;

Dated this 11th day of September, 2013.

BY THE COURT:


Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
DEPUTY